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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 ) CC Docket No. 96-45  
Federal-State Joint Board on )  
Universal Service )

**COMMENTS OF NEXTEL COMMUNICATIONS, INC.**

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## SUMMARY

Nextel Communications, Inc. ("Nextel") supports the Commission's efforts to simplify and improve the universal service process as it is applied to the wireless industry. It is not only appropriate that the Commission address CMRS-specific universal service reporting issues, the Commission should end this proceeding with tailored, CMRS-specific answers. Nextel believes it is essential that any permanent universal service contribution mechanism for the wireless industry provide a reasonable level of certainty for CMRS carriers. A reasonable safe harbor methodology would provide a greater amount of certainty to wireless providers as well as provide consistency and predictability of contribution amounts than continued reliance on a good faith estimate approach. In order for this option to be viable, however, every wireless carrier must be given the ability to opt out of the safe harbor by filing waivers for each of its markets as it defines them. In addition, the Commission should not force "common-market" reporting, such as requiring universal service worksheet forms on an MTA-by-MTA basis. There would be no regulatory benefit derived from requiring reporting and contribution on this basis. It would be a waste of carriers' resources and could force needless reconfiguration of carrier operations. Instead, CMRS carriers should be permitted to continue to submit Worksheets for each of their established operating units or licensed entities.

The Commission should not adopt any of the simplifying assumptions in the *Further Notice*. At this point it is not evident that a significant number of CMRS carriers would opt out of the safe harbor and conduct their own traffic studies. Thus, the cost of developing assumptions at this point is not justified. Furthermore, it is unlikely that accurate traffic study assumptions could be established at any price. Thus, the Commission should focus on refining a

safe harbor approach and abandon any notion of requiring CMRS carriers to perform periodic or episodic traffic studies.

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Nextel Communications, Inc. ("Nextel"), by its attorneys, hereby submits these comments in response to the *Further Notice of Proposed Rulemaking* in the above-referenced matter.<sup>1/</sup> Nextel is a broadband Commercial Mobile Radio Service ("CMRS") provider of advanced digital communications services available in over 400 cities nationwide. Nextel offers an integrated package of digital wireless services of particular value to businesses, including cellular service, Direct Connect (a two-way dispatch service that provides instant conferencing capabilities), paging and alphanumeric short-messaging services. Nextel also provides traditional analog Specialized Mobile Radio ("SMR") service for nearly a half million users.

The experience Nextel has had with the Commission's implementation of its federal universal service program is like that of other CMRS providers. Namely, while Nextel supports the affordability and widespread availability goals of the universal service program contained in Section 254 of the Telecommunications Act of 1996 and the Commission's universal service program, the details of universal service implementation addressing carrier reporting and

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<sup>1/</sup> See Federal-State Joint Board on Universal Service, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-45, FCC 98-278, rel. October 26, 1998 ("*Memorandum Opinion and Order*" and "*Further Notice*").

assessments have proven to be extremely nettlesome. CMRS carriers are unaccustomed to performing jurisdictional allocations of traffic or revenue, or identifying and classifying revenue as reportable "end-user telecommunications revenue" or excluded revenue. Thus, to the extent it ultimately provides CMRS carriers with greater certainty in providing accurate and responsive information to the Universal Service Worksheet, Nextel supports the Commission's exploration of ways to simplify and improve the process.

In its *Memorandum Opinion and Order and Further Notice*, the Commission adopted interim guidelines and proposed several alternative mechanisms for wireless providers to use in reporting their universal service contribution amounts. The Commission characterizes its interim guidelines as a "safe harbor" for all broadband CMRS carriers that elect to report at least 15% interstate revenues. By operating under this safe harbor, a CMRS carrier would not be asked by the Commission or the Universal Service Administrator to substantiate its calculations of interstate end-user telecommunications revenue.<sup>2/</sup>

The proposed going forward alternatives in the *Further Notice* each have distinct advantages and disadvantages. On balance, however, a mechanism like the safe harbor that sets a presumptively reasonable level of interstate revenues for specific categories of CMRS providers is a workable option both on an interim and permanent basis. This approach would provide a reasonable level of certainty to wireless carriers' universal service contribution calculations. The Commission's watchword in this proceeding should be simplification, not the addition of further regulatory requirements on CMRS carriers to develop and perform Commission-sanctioned traffic studies either on a periodic or episodic basis.

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<sup>2/</sup> *Memorandum Opinion and Order* at ¶ 11.

## I. INTRODUCTION.

Nextel is encouraged by the Commission's willingness to examine ways to improve the universal service process as applied to the wireless industry. Nextel believes it is important that a concrete outcome of this process be the creation of a reasonable level of certainty for CMRS carriers.<sup>3/</sup> Any sustainable solution must avoid the pitfalls of the past and must accord CMRS distinct treatment where such treatment is warranted.

In its May 1997 Order adopting the new and revised Universal Service program, the Commission stated its belief that universal service support mechanisms based on combinations of intrastate, interstate, and international end-user telecommunications revenues would prove simple and straightforward to administer for all carrier contributors.<sup>4/</sup> This has not proven to be the case for CMRS carriers.<sup>5/</sup> Responding to CMRS industry requests for guidance, the Commission concluded that contributors unable to derive interstate revenues from their books of account could provide "good faith" estimates of the jurisdictional allocation of their

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<sup>3/</sup> This benefit of certainty extends to customers because once a program becomes better understood and established, carriers can make more definitive and precise judgments regarding their policies for recovery of these federal universal service costs from their customers.

<sup>4/</sup> See Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd 8776, 9203 (1997) ("*First Report and Order*").

<sup>5/</sup> In particular, unlike landline carriers, CMRS carriers typically have had no business reason to distinguish interstate versus intrastate costs or revenues and, therefore, were not able to provide precise jurisdictional revenue breakdowns. Upon release of the Commission's Universal Service Worksheet, CTIA, on behalf of affected CMRS providers, and some carriers individually filed requests for clarification of how CMRS carriers were to fill out the Worksheet that requested information that was either unavailable or entirely foreign to the way CMRS carriers operate or CMRS service is delivered. See Letter from Randall S. Coleman, Vice President for Regulatory Policy and Law, CTIA, to Jeanine Poltronieri, Associate Chief of the Wireless Telecommunications Bureau, Federal Communications Commission (August 21, 1997).

telecommunications revenues.<sup>6/</sup> The Commission observed that contributors could derive their estimates using any method that they, in good faith, believed would yield a "reasonably accurate result."<sup>7/</sup> Thus, the Commission declined to prescribe any method for identifying and jurisdictionally classifying end-user telecommunications revenues for CMRS carriers engaging in this exercise for the first time.<sup>8/</sup>

Apparently recognizing that an approach based only on good faith estimates inevitably yields a wide range of results, the Commission has instituted this proceeding. At base, the Commission's concern appears to be one of regulatory parity — that all CMRS carriers make common assumptions or contribute to the program on the same general basis so that the universal service program has no direct impact, for good or ill, on CMRS-to-CMRS competition.<sup>9/</sup> While Nextel agrees that the Commission should act to eliminate inequities potentially created by the Commission's failure to provide guidance previously, Nextel believes that the Commission should not go beyond articulating broad principles for CMRS carriers to apply given the dynamic and changing nature of the CMRS industry and the differing circumstances of competing CMRS providers.

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<sup>6/</sup> See Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board on Universal Service, *Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking*, 12 FCC Rcd 12444, 12453 (1997) ("*Second Report and Order*").

<sup>7/</sup> *Id.*

<sup>8/</sup> CMRS carriers already have filed several USF Worksheets that estimate end-user telecommunications revenues and allocate these revenues by jurisdiction relying upon the Commission's direction to derive information using a good faith estimate approach.

<sup>9/</sup> *Further Notice* at ¶ 17.



## II. THE COMMISSION SHOULD CLARIFY THAT THE INTERIM SAFE HARBOR GUIDELINES WILL BE APPLIED PROSPECTIVELY.

Nextel supports the Commission's decision to issue interim safe harbor guidelines for the CMRS industry. These guidelines on jurisdictional reporting provide greater certainty and direction regarding what the Commission expects than does a continued application of a good faith estimate approach.<sup>10/</sup> However, the Commission has provided no specificity on how it intends the safe harbor rule to be applied. It would, of course, raise procedural problems were the Commission or the USF Administrator to revisit already filed USF Worksheets and review them according to newly announced standards.<sup>11/</sup> Nextel supports the creation of a prospective safe harbor for CMRS interstate jurisdictional separations beginning with the next USF Worksheet reporting period.<sup>12/</sup> The safe harbor interim guidelines should not be used as a basis to question the good faith estimates that carriers had no alternative but to formulate and apply in past reporting periods. A CMRS carrier's decision to adopt the safe harbor interstate allocation on a going-forward basis has no direct relationship to the accuracy of its prior good faith

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<sup>10/</sup> While the *Further Notice* does not speak to this point, Nextel assumes that, until the Commission provides some guidance, the good faith estimate approach will remain valid with respect to all other assumptions CMRS carriers must make in order to complete the USF Worksheet.

<sup>11/</sup> See *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987) (holding that retroactive application of rules adopted pursuant to the notice and comment procedures of the APA is foreclosed by the express terms of the APA), *aff'd on other grounds*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

<sup>12/</sup> This prospective application should not create any particular concern or problem for the Commission or the USF Administrator, as under the good faith estimate regime carriers were warned that their assumptions and basis for good faith estimates could be reviewed. *Second Report and Order* at ¶ 12453.

estimates and must not be used by either the Commission or the USF Administrator to audit or impugn those good faith estimates.

### **III. A REASONABLE SAFE HARBOR ALLOCATION METHODOLOGY WOULD PROVIDE GREATER CERTAINTY.**

Any permanent universal service contribution methodology must be suited to the realities of the wireless marketplace. While the Joint Board and the Commission initially believed that a jurisdictional and revenue-based reporting and contribution scheme would work well for all telecommunications carriers, experience has shown that the problems with the current reporting system for CMRS are intractable. As the *Further Notice* observes, wireless carriers offer services that are entirely disassociated with the geographic boundaries that are meaningful for traditional landline telecommunications services.<sup>13/</sup> Increasingly, CMRS services are not segregated into local and interexchange components, but are delivered on a "one rate" basis that ignores traditional service and geographic delineations.

For CMRS carriers to report and contribute on the basis the Commission originally envisioned, the Commission, together with CMRS carriers, would need to develop conventions and assumptions about geography, services and the composition of carrier networks that would be applied to carrier-specific traffic studies. Particularly since other approaches to CMRS contributions can ensure the same overall level of contribution by the CMRS industry to the universal service program, it is inconceivable that any benefits of a simplified traffic study

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<sup>13/</sup> See *Further Notice* at ¶¶ 20, 24. As the Commission is well aware, CMRS carriers routinely bundle telecommunications and non-telecommunications services into integrated service and equipment packages. This common characteristic of the CMRS marketplace makes the identification of net end-user telecommunications revenues an additional reporting problem.

approach could outweigh the costs to CMRS carriers, including the potential disruption of resources and distraction such an exercise would entail. It is entirely appropriate for the Commission to seek less invasive alternatives.

A permanent universal service contribution methodology that requires CMRS carriers to declare the jurisdictional nature of their revenues using a reasonable safe harbor — with the option to opt out of the safe harbor by filing a waiver — would be a workable methodology that provides greater certainty to CMRS carriers. Wireless providers must, however, be afforded the option of evaluating each of their internally-defined markets individually in assessing whether the safe harbor leads to a reasonably accurate result or whether a waiver is required for a particular market.<sup>14/</sup> As the Commission observed in its *Memorandum Opinion and Order and Further Notice*, a safe harbor percentage based on the percentage of interstate landline traffic reported for purposes of the Dial Equipment Minutes ("DEM") weighting program is a reasonable proxy for the percentage of interstate wireless traffic as a whole.<sup>15/</sup> However, each wireless carrier is in the best position to determine whether this proxy is sufficiently representative of the traffic mix for the markets where it operates.

The Commission properly recognized that the adoption of a safe harbor approach requires several assumptions that may or may not accurately reflect a carrier's actual operations.

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<sup>14/</sup> The market-specific waiver should be based upon each carrier's own definition of the geographic market or markets in which it operates. Thus, for example, a carrier's internal market definitions could be based upon the carrier's established operating units or licensed entities.

<sup>15/</sup> See *Further Notice* at ¶ 13.

Thus, Nextel agrees that the Commission must always make a waiver process available if the Commission adopts the safe harbor as a permanent fixture.<sup>16/</sup>

The Commission also requested comment on the desirability of adopting a common market reporting requirement, such as requiring CMRS carriers to file Worksheets on an MTA-by-MTA basis.<sup>17/</sup> Requiring reporting and contribution on this basis would be an unworkable waste of carriers' resources. Nextel's digital wireless operations, for example, are not licensed on an MTA basis and do not operate using MTA boundaries.<sup>18/</sup> Unless each CMRS carriers' operations are uniform as compared to its competitors throughout an MTA — and the Commission well knows that this is not the case — there is no benchmarking or other overwhelming regulatory benefit Nextel can imagine from forcing CMRS carriers to reconfigure their internal operations to reflect common markets. It is neither practical nor productive to force carriers to report on an MTA basis. Instead, the Commission should continue to allow CMRS carriers to submit Worksheets for each of their established operating units or licensed entities.

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<sup>16/</sup> As discussed below, the Commission should not spend resources specifying how traffic studies should be performed or delineating the components of a waiver demonstration. Rather, the waiver process should remain an open one that permits carriers to present whatever evidence they believe demonstrates the need for a waiver.

<sup>17/</sup> *Further Notice* at ¶ 24.

<sup>18/</sup> Nextel is organized operationally by geographic region. It has little alternative but to file USF Worksheets and to analyze traffic on this same basis.

#### IV. THE COMMISSION SHOULD NOT ADOPT SIMPLIFYING ASSUMPTIONS.

Another alternative the Commission posits is the adoption of simplifying assumptions for CMRS carriers to assist them in developing traffic studies.<sup>19/</sup> As an initial matter, it is not evident that a significant number of CMRS carriers will opt out of the established safe harbor and choose to conduct their own traffic studies.<sup>20/</sup> Thus, the costly, time consuming and burdensome process of developing and testing assumptions to be applied either to periodic or episodic wireless traffic studies is not justified at this point.

In addition, it is unlikely, even after a great deal of industry and Commission resources are expended, that accurate traffic study assumptions could be established. To be precise enough to be useful, the Commission would have to utilize a number of variables and assumptions based upon each CMRS carrier's individual data collection procedures. Because cell sites and CMRS switches (which serve as potential points for tracking the origin of traffic) may cover and serve several states, assumptions based on traffic at these points in a wireless network are very imprecise and would not lead to an accurate measurement of interstate traffic.

In the end, a methodology established as a permanent mechanism for wireless carriers to conduct simplified traffic studies would not be any more precise than the other alternatives

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<sup>19/</sup> While the *Further Notice* is unclear on this point, Nextel assumes that the traffic studies under consideration would either be used as support for a waiver of any safe harbor estimate or, in the absence of a safe harbor, used as the basis for each CMRS carrier's estimation of interstate revenues.

<sup>20/</sup> It is not a foregone conclusion, as well, that CMRS market traffic studies would yield a representative proxy for the jurisdiction of CMRS end-user telecommunications revenues. There are a large number of rate plans available from carriers in each market and simply measuring the jurisdiction of a call might fail to correspond to the jurisdiction of the revenue.

identified. The considerable time and resources that would be spent establishing a methodology would not lead to greater certainty. In fact, to the extent the methodology permits a wide range of possible assumptions, carriers would have the ability to selectively adopt assumptions. The result of this would be underreporting which would lead to inequities in contribution amounts — the very effect the Commission tried to avoid by eliminating the good faith estimate approach. For these reasons, the Commission should not endeavor to develop or sanction any traffic study methodology based upon simplified assumptions.

## **V. CONCLUSION.**

Nextel respectfully requests the Commission adopt a permanent mechanism that provides a reasonable degree of certainty to wireless providers when reporting universal service contribution information. Nextel submits that a mechanism that provides a reasonable safe harbor but allows CMRS providers to allocate revenues as either interstate or intrastate based upon information the carrier possesses is the preferable option. Nextel supports the Commission's initiative to provide CMRS carriers guidance in navigating Commission forms and processes ill-suited to the realities of the wireless business. Even if there were no Commission-expressed concern about neutrality and parity among competing CMRS providers, the Commission should move to resolve longstanding questions about universal service implementation as to CMRS. It is important, however, that the Commission do so in a manner

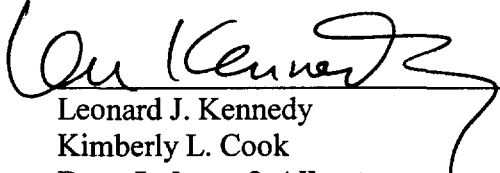
that does not create further uncertainty or additional unnecessary regulation of CMRS carrier practices.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I, Cynthia S. Shaw, a secretary at Dow, Lohnes & Albertson, PLLC, do hereby certify that on this 11th day of January, 1999, a copy of the foregoing "Comments of Nextel Communications, Inc." was sent by hand delivery to the following:

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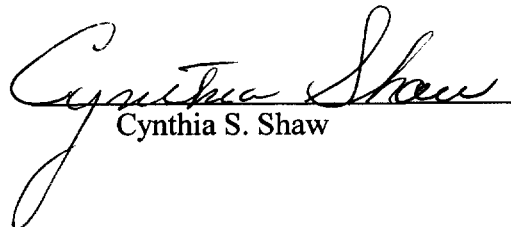
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